IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.BALAKRISHNAN NAIR

FRIDAY, THE 23RD MARCH 2007 / 2ND CHAITHRA 1929

WP(C).No. 4981 of 2007(R)

PETITIONER:

M/S.BAVASONS CONSTRUCTIONS PVT.LTD.,
41/2388-B, 1ST FLOOR, V.B.M BAVA CHAMBERS
PARAMARA ROAD, KOCHI- 682 018.
REP.BY ITS MANAGING DIRECTOR, V.M.LIAQUATH ALI,
S/O LATE V.B.MOHAMMED.

BY ADV. SRI.SHAJI P.CHALY
SRI.S.GOPAKUMAR

RESPONDENTS:

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1. **STATE OF KERALA REPRESENTED BY THE SECRETARY, REVENUE, SECRETARIAT, THIRUVANANTHAPURAM.**

2. **THE DISTRICT COLLECTOR, ERNAKULAM.**

3. **THE TAHSILDAR, KANAYANNOOR TALUK, KOCHI-11.**

BY SRI. GOVERNMENT PLEADER SRI.MOHAMMED RAFIQ

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 23/03/2007, ALONG WITH WPC.5083/2007 AND CONNECTED CASES THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

W.P.(C) NO. 4981/2007

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1:- COPY OF THE ASSESSMENT NOTICE ISSUED BY THE 3RD RESPONDENT DT.29.12.06.

EXT.P2:- COPY OF THE REPLY NOTICE ISSUED BY THE PETITIONER TO THE 3RD RESPONDENT DT. 16.1.07.

EXT.P3:- COPY OF THE ORDER OF ASSESSMENT DT.17.1.07.

EXT.P4:- COPY OF THE NOTICE OF DEMAND DT.17.1.07.

EXT.P4(a):- COPY OF THE NOTICE OF DEMAND DT.17.1.07.

EXT.P5:- COPY OF THE DETAILS OF THE EACH OF THE APARTMENT OWNERS AND THE ARES OF EACH APARTMENT.

EXT.P6:- COPY OF THE AGREEMENT ENTERED INTO BETWEEN THE PETITIONER AND APARTMENT OWNER .

EXT.P7:- COPY OF THE ONE OF THE SALE DEED EXECUTED BY THE PETITIONER.

EXT.P8:- COPY OF THE PLAN .

/TRUE COPY/

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K.BALAKRISHNAN NAIR,J.

WP(C)NOS.4981, 5083,9193, 9303,9397,9977,10022,10093, 10095,10120 & 10160 OF 2007

Judgment

WP(C)NOS.4981, 5083,9303,9397,9977,10095 & 10120 OF 2007

Common questions arise for decision in these Writ Petitions. Therefore, they are heard and disposed of by this common judgment. The main point that arises for decision in these cases is whether the petitioners, who are builders of residential apartments, are entitled to get the benefit of the second explanation to Section 2(e) of the Kerala Building Tax Act. The said explanation reads as follows:

> *"Where a building consists of different apartments or flats owned by different persons and the cost of construction of the building was met by all such persons jointly, each such apartment or flat shall be deemed to be a separate building."*

2. Essentially, whether the petitioners are entitled to get the benefit of the above quoted explanation is a question of fact, which cannot be decided in a Writ Petition. It has to be decided by the fact finding authorities. But, alleging that the decision making process is vitiated, the petitioners have directly approached this Court. Since I find considerable force in their submission, these Writ Petitions are entertained.

3. The petitioners in these Writ Petitions are builders, who constructed residential flats in the properties owned by them. They submit, all those flats were allotted to individual flat owners under separate agreements before the

commencement of the construction or immediately thereafter. The individual allottees have advanced the necessary funds for completing the construction, as agreed, from time to time, in instalments. By the time, the construction was over and they paid the entire amount. Thereafter, the undivided rights in the land were also assigned to them by registered sale deeds. In some cases, the sale deeds were executed even before the completion of the construction. So, the petitioners submit, while assessing the building tax for the residential complexes constructed by them, they are entitled to get the protection of Explanation 2 to Section 2(e) of the Kerala Building Tax Act.

4. All the petitioners point out that they were not given an effective opportunity to present their case, claiming the benefit of the above quoted explanation. Without giving them a proper opportunity and without referring to the materials produced by them, they have been held to be not entitled to get the benefit of the said explanation and the buildings have been assessed to building tax, treating the same as a single unit. In some cases, the assessment orders have been issued in printed formats, without referring to any of the facts of the case. So, the petitioners pray for quashing the impugned assessment orders and consequential demands.

5. I heard the learned Government Pleader appearing for the respondents. In most of the cases, I find that without giving a proper opportunity of being heard to the petitioners and without dealing with the contentions raised by them, the assessments have been made. The agreements entered into between the allottees of the flats and the petitioners were ignored, for the reason that they

were not registered agreements. Apparently, it was done, on the strength of two circulars issued by the Government to ignore unregistered agreements. Those circulars are produced as Exts.P8 and P9 in Writ Petition (C) No.10095 of 2007.

6. The assessment of building tax is a quasi-judicial function. While making the assessment, the Assessing Officer will be guided, only by the provisions of the Building Tax Act and the Rules. He shall not be guided by any instruction issued by the superior officers or by the Government. The circular issued by the Government that unregistered agreements entered into between the builders and the allottees of the flats should be ignored, is illegal and unsustainable. The assessing authority shall not, in any way, be influenced by the said circular.

7. Under the provisions of the Kerala Building Tax Act, the Government have power to issue orders for removal of difficulties. But, the said power cannot be exercised to issue directions to the authorities, exercising judicial/quasi-judicial functions, dictating to them, how to exercise those functions. See the decision of the Apex Court in ***B.Rajagopala v. STA Tribunal*** (AIR 1964 SC 1573). The relevant portion of the said decision reads as follows :

> *"In interpreting S.43A, we think, it would be legitimate to assume that the legislature intended to respect the basic and elementary postulate of the rule of law, that in exercising their authority and in discharging their quasi-judicial function the Tribunals constituted under the Act must be left absolutely free to deal with the matter according to their best judgment. It is*

of the essence of fair and objective administration of law that the decision of the Judge or the Tribunal must be absolutely unfettered by any extraneous guidance by the executive or administrative wing of the State. If the exercise of discretion conferred on a quasi-judicial Tribunal is controlled by any such direction, that forges fetters on the exercise of quasi-judicial authority and the presence of such fetters would make the exercise of such authority completely in-consistent with the well-accepted notion of judicial process. It is true that law can regulate the exercise of judicial powers. It may indicate by specific provisions on what matters the tribunals constituted by it should adjudicate. It may by specific provisions lay down the principles which have to be followed by the Tribunals in dealing with the said matters. The scope of the jurisdiction of the Tribunals constituted by statute can well be regulated by the statute and principles for guidance of the said tribunals may also be prescribed subject of course to the inevitable requirement that these provisions do not contravene the fundamental rights guaranteed by the Constitution. But what law and the provisions of law may legitimately do cannot be permitted to be done by administrative or executive orders."

In view of the above quoted decision, the circular issued by the Government to ignore unregistered agreements is ultra vires and unauthorised.

8. I find considerable force in the attack made by the petitioners against the assessment orders. They have been issued in violation of the principles of natural justice. The relevant matters were not adverted to, while issuing those orders. So, they are unreasonable in the administrative law sense. Accordingly, they are quashed.

9. The petitioners-builders shall produce materials before the concerned Tahsildars regarding the allotment of individual flats to the respective owners. They shall also produce the agreements entered into with the owners of flats and also evidence to show that the payments were made by the allottees from time to time to foot the bills for the construction. They shall produce their books of accounts and bank statements. They shall also produce the deeds, assigning the undivided interest in the property. They shall produce those materials before the concerned Tahsildars before 30.04.2007. If those materials are produced to show that the construction of the flats is covered by Explanation 2 to Section 2(3) of the Building Tax Act, then, the assessments shall be made separately. The assessing authorities shall consider the claim relating to each flat and render a separate speaking decision with reference to each flat. A common order can be passed for each residential complex. But, in that order, there should be separate finding regarding each flat/apartment. In case any flat is remaining unallotted, the assessment in respect of such flat shall be made, treating the builder as the owner. In case, in relation to a particular flat, sufficient materials are not produced to support the claim for the benefit of Explanation 2 to Section 2(e), then also, the assessment shall be made, treating the builder as the owner of the

apartment. While making separate assessments of the flats, the common area shall also be divided on pro rata basis, so that the entire built up area of the building is assessed to building tax. The petitioners shall also furnish the correct addresses, as far as possible, of the allottees of the flats, to the assessing authorities. The assessing authorities shall afford an opportunity of being heard to the petitioners-builders and the individual flat owners and pass final orders in the matter, as far as possible, before 30.07.2007. They shall, as stated earlier, deal with the assessment relating to every flat/apartment separately, with reference to the documents produced. In this context, it is apposite to remind the assessing authorities, the powers conferred on them under Section 17 of the Act. The said section reads as follows :

> *"Power to take evidence on oath etc. - The assessing authority, the appellate authority and the revisional authority shall, for the purpose of this Act, have the same powers as are vested ina Civil Court under the Code of Civil Procedure, 1908 (Central Act 5 of 1908), when trying a suit, in respect of the following matters, namely :-*
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> *(a) enforcing the attendance of any person and examining him on oath or affirmation ;*
>
> *(b) compelling the production of documents ;*
>
> *(c) issuing commissions."*

10. Basically, as mentioned earlier, whether the petitioners are eligible for the benefit of the above said Explanation or not, is a finding of fact. So, in case,

any of the parties are aggrieved by the decision of the assessing authority, rendered pursuant to this Judgment, they have remedies under the Act by way of appeal and revision. Needless to say, if the area of the flat along with the addition made for the common built up area comes below 100 sq.mts, the said apartment shall be exempted from the liability to pay building tax, provided it is covered by the second explanation to Section 2(e) quoted earlier. If it is found that all or any of the apartments are not entitled to get the benefit of the said explanation and that they have to be assessed as a single unit, while making the assessment, the total amount of tax found due shall be apportioned, mentioning the pro-rata tax due, in relation to each apartment. This direction is issued, so that the persons who came to own the flats/apartments after the date of completion of the building, i.e., after the occurrence of the taxable event, can pay the amount, if they think fit, subject to the terms of the agreement, they have entered into with the builder.

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11. The petitioners in these cases are builders, who entered into agreements with the land owners concerned and constructed residential complexes. Both sides submit that the directions issued in the Judgment in Writ Petition (C) No.4981/07 and connected cases may be issued in these cases also. Accordingly, it is ordered that the directions issued in Writ Petition (C) No.4981/07 will govern these cases also. In these cases also, the assessment

orders/demand notices are set aside and the assessments shall be completed as directed in the above batch of Writ Petitions.

The Writ Petitions are disposed of as above.

23.03.2007 **K.BALAKRISHNAN NAIR,JUDGE**

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